# In the
# Supreme Court of the United States
**October Term, 1945**

---

# No.

---

BERTHA FLORENCE SABIN AND M. R. SABIN,
*Petitioners,*

VERSUS

HOME OWNERS' LOAN CORPORATION, A CORPORATION,
GEORGE J. OVERMYER AND BRENDA E. OVERMYER.

---

## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

---

### OPINIONS

The opinion of the Supreme Court of the State of Oklahoma in the foreclosure case leading up to this case (by Justice Riley, concurred in by Justices Bayless, Osborn, Hurst and Davison) is reported in 187 Okla. 504, 105 Pac. (2) 245.

No opinion was rendered by the United States District Court.

The opinion of the Circuit Court of Appeals for the Tenth Circuit in a companion case (No. 269 in this Court) (Circuit Judges Phillips, Bratton, and Murrah, written by Judge Bratton) was rendered February 21, 1945, and is

found at Page 399 of the record, and is reported in 147 Fed. (2d) 653.

The opinion of the Circuit Court of Appeals for the Tenth Circuit, in this case (Circuit Judges Phillips, Huxman and Murrah, written by Judge Huxman) was rendered October 30, 1945, and is found at Page 220 of the record, and is reported in 151 Fed.(2d) 541.

## JURISDICTION

Jurisdiction of this Court to grant *certiorari* is invoked under Title 28, Section 347(a), U.S.C.A. (Jud. Code, Sec. 240, as amended), and is shown in the petition at Page 14.

## STATEMENT OF THE CASE

The facts have also been sufficiently set out in the petition at page 2. Particular attention is called to the fact that the sheriff's deed (R. 132), was executed and delivered at a time when execution was stayed by order of the Court (R. 25, 27, 198); also, to the fact that the alias writ of assistance was executed at a time when the Supreme Court of Oklahoma had permitted to be filed and had under consideration a petition to recall mandate and grant a hearing (R. 37, 38).

Particular attention is further called to the fact that the trial Court herein rendered a summary judgment without affording petitioners an opportunity to prove the allegations of their petition—and which they have never at any

state of this matter ever been permitted to prove before any Court, although they at all times sought an opportunity to do so, and which they still seek.

## SPECIFICATIONS OF ERRORS

### I.

The sheriff's deed was and is void, because issued at a time when execution was stayed, and the Circuit Court of Appeals was in error in failing to hold that petitioners have been denied due process of law by having been evicted under an alias writ of assistance issued to put the H.O.L.C. in possession under such void sheriff's deed.

### II.

The alias writ of assistance is further void because it was executed at a time when the Supreme Court of Oklahoma had re-assumed and had exclusive jurisdiction of the case, and the Circuit Court of Appeals was in error in failing to hold that petitioners have been denied due process of law by being evicted under such writ.

### III.

The trial Court could not properly render summary judgment in view of the allegations of the petition, but should have heard the evidence; and this amounts to a denial of due process of law.

## ARGUMENT

### I.

### The Sheriff's Deed Was Void

The applicable statutes of the State of Oklahoma at the time of the foreclosure proceedings, sale and the issuance of the sheriff's deed, were the Oklahoma Statutes of 1931.

Section 456 of these statutes (Appendix III) provides that, among other necessary steps in the enforcement of a judgment by "execution," there must be a confirmation of the sale by the court.

This required order of confirmation is an appealable order, i.e., a final judgment from which an appeal may be taken.

—*Vann* v. *Union Central Life Ins. Co.*, 79 Okla. 17, 191 Pac. 175;

*Morrison* v. *Burnett*, 154 Fed. 617;

*Dakota Investment Co.* v. *Sullivan*, 9 N. D. 303, 81 Am. St. Rep. 584;

*Wauchope* v. *McCirmick*, 158 Mo. 660, 59 S. W. 970;

*State Nat. Bank* v. *Neel* (Ark.), 122 Am. St. Rep. 185;

*Hammond* v. *Cailleand*, 111 Cal. 206, 52 Am. St. Rep. 167;

*Koehler* v. *Ball*, 2 Kan. 160, 83 Am. Dec. 451.

Quoting from *Vann* v. *Union Central Life Ins. Co.*, *supra*, it is therein said:

"* * * an appeal may be prosecuted from the order of confirmation."

In the same section of the statute providing for confirmation of the sale (Okla. Stat. 1931, Section 456, *supra*), it is further provided that upon such confirmation being made there shall be "an order that the officer make to the purchaser a deed."

Section 457, Okla. Stat. 1931 (Appendix III), provides for the necessary recitals of the sheriff's deed, and that it

"shall be sufficient evidence of the legality of such sale."

Section 424, *id.*, provides that:

> "* * * The court may, in the order confirming a sale of land under order of sale on foreclosure or upon execution, award or order the issuance of a writ of assistance by the clerk of the court to the sheriff * * * to place the purchaser in full possession of such land. * * *"

Section 546, *id.* (Appendix V) provides that at any time when the time for making or completing a case-made for appeal is extended the court or judge "*shall* include in such order an order *staying execution* pending the giving of an undertaking."

All of these things were included in the order of confirmation of sale in this case (Appendix I-III), i.e., (1) the sale was confirmed; (2) the sheriff was directed to make a deed; (3) a writ of assistance was ordered to put the purchaser in possession; (4) notice of appeal was given; (5) the petitioners were given an extension of time to make and serve case-made; and (6) petitioners were given twenty days to file a supersedeas bond.

While the order of confirmation did not specifically order that the execution be stayed during the twenty days allowed to file supersedeas bond, we argued to the Circuit Court of Appeals, and that Court stated in its opinion (R. 404), "with that we are not in disagreement," that the stay was granted even without being in the order by reason of the mandatory requirements of Okla. Stat. 1931, Section 546 (12 Okla. Stat. 1941, Section 971) that whenever the time

for making case-made is extended the court *shall* include in such order "staying execution pending the giving of an undertaking," and by reason of the fact that the court did, in fact, allow twenty days to file supersedeas bond.

This section of the statute was construed in *Howe* v. *Farmers & Merchants Bank,* 155 Okla. 284, 8 Pac. (2d) 665, the Court saying:

> "* * * In 1905 it was provided that in extending the time for settling and signing of a case-made, the trial court should fix the time within which an undertaking might be given *to become immediately operative and effect a stay* pending the perfecting of the appeal."

The Circuit Court of Appeals states in its opinion (R. 404).

> "* * * But no bond was ever given to supersede the order of confirmation. The extended time for the making and completing of the case-made has long since expired. And we understand that no appeal from the order was ever perfected. The contention that the deed is presently void because at the time of its execution and delivery an order was in force and effect staying execution of the judgment is without merit."

Both of the conclusions of fact upon which this conclusion of law is apparently based, are incorrect; for, as a matter of fact, a bond was given to supersede the order of confirmation, and an appeal was perfected from that order.

While the opinion by the Supreme Court of Oklahoma in *Sabin* v. *Home Owners' Loan Corporation, supra,* does not directly say that an appeal from the order of confirmation was perfected, but it is to be noted that in the opinion the Court says:

"* * * After exhaustive hearings the trial court confirmed the sale September 9, 1938. Defendants gave notice of appeal therefrom.

"In the meantime, August 8, 1938, defendants filed an appeal from the judgment of foreclosure.

"In their second proposition for reversal defendants urge the sale was premature because six months had not elapsed since the motion for a new trial was overruled, and that the sale price was grossly inadequate."

And both of these questions were considered and passed on by the Court in its opinion. It is at once apparent that, since the appeal from the original judgment of foreclosure was filed on August 8, 1938, there would have had to be another appeal perfected from the order confirming sale, which was on September 9, 1938, in order for the Court to know that the sale had been confirmed and to pass upon the questions presented upon the confirmation. It has never been contended otherwise by any of the parties.

The record also shows conclusively that a bond was eventually given to supersede the order (judgment) of confirmation; not, it is true, for $6,500.00 and not within the twenty days allowed, but within the extended time allowed by the Supreme Court of Oklahoma and in the sum of $2,000.00 as fixed by that Court. See Court orders on "bond" (R. 199, 203).

On September 26, 1938, the Supreme Court of Oklahoma made an order (R. 198) that:

> "* * * execution and all further proceedings * * * in the District Court of Tulsa County, Oklahoma, be stayed until further order of this Court."

And, on February 27, 1939, there was filed in and approved by the Clerk of the Supreme Court of Oklahoma, a supersedeas bond in the amount of $2,000.00 (R. 29) (R. 203), which bond was conditioned that:

> "* * * if the judgment be affirmed, they will pay the value of the use and occupation of the property from the date of this obligation until the delivery of possession thereof, * * *"

in accordance with the provisions of Section 543, Okla. Stat. 1931 (Appendix IV), providing that when the final order directs the delivery of possession of real property an undertaking to stay execution must be so conditioned.

It is held in *Local Bldg. & Loan Ass'n* v. *Hall,* 145 Okla. 206, 292 Pac. 68, that these are the conditions necessary to be in a supersedeas bond given in an appeal from an order of confirmation of sale of real estate in a mortgage foreclosure proceeding.

We submit, therefore, that, contrary to the conclusion of the Circuit Court of Appeals in *Sabin* v. *H.O.L.C.,* 147 F(2) 653) (No. 269, Oct., 1945, in this Court) as to the facts, there was from September 9, 1938, until September 29, 1938, an effective stay by reason of the order contained in the order of confirmation by the District Court of Tulsa County; that from September 26, 1938, such stay was continued in effect by order of the Supreme Court of Oklahoma until February

27, 1939; and that from February 27, 1939, such stay was in effect by reason of the filing and approval of the supersedeas bond, within the time allowed, as extended. See (R. 203) Supreme Court order of February 14, 1939, fixing amount of supersedeas bond in sum of $2,000.00 and granting time to post same.

These facts being true, it is submitted that no valid sheriff's deed could have been executed and delivered on the same day as the order of confirmation, September 9, 1938.

The statute (Okla. Stat. 1931, Section 456, *supra*) requires confirmation before a deed may issue. The issuance of the deed is the final step in the execution of the "execution" (or order of sale). But, further execution had been stayed, and was eventually superseded. In other words, the sheriff had proceeded to make a levy under the execution in his hands; he had given notice of sale, and sold the property, and the sale was confirmed. We do not contend that the stay or the supersedeas would undo that which was already done; but that its object and effect were to stay future proceedings.

—*Dulin* v. *Pacific Wood & Coal Co.*, 98 Cal. 306, 33 Pac. 123;
*Hey* v. *Harding* (Ky.), 78 S. W. 136;
*Gardner* v. *Continental Ins. Co.* (Ky.), 101 S. W. 911, 912;
*Runyon* v. *Bennett*, 34 Ky. (4 Dana) 598, 29 Am. Dec. 431.

The execution and delivery of the sheriff's deed (and, if necessary, a writ of assistance) were the only steps left to be taken following the order of confirmation; they were

the only things to be done which there would be any object in staying or superseding (R. 199) for it is the deed which vests the legal title in the purchaser, and once the purchaser obtains a valid legal title he would become immediately entitled also to possession.

What, then, is the effect of this sheriff's deed issued in violation of the stay and supersedeas?

The Statutes of Oklahoma providing for a sheriff's deed (Okla. Stat. 1931, Sections 456, 457, *supra*) were adopted at Statehood from the Statutes of Kansas, Sections 4556, 4557, then in effect, as is shown by the history in the Statutes of 1931; and with them were adopted the interpretation of those statutes as theretofore made by the Supreme Court of Kansas.

—*Harness* v. *Myers*, 143 Okla. 147, 288 Pac. 285;
*Thompson* v. *Smith*, 102 Okla. 150, 227 Pac. 77;
*Byrd* v. *State*, 99 Okla. 165, 226 Pac. 362;
*Henrietta Min., etc., Co.* v. *Gardner*,
19 Sup. Ct. 327, 173 U. S. 123, 43 L. ed. 637;
*Willis* v. *Eastern Trust, etc., Co.*,
18 Sup. Ct. 347, 169 U. S. 295, 42 L. ed. 752;
*Whitney* v. *Fox*, 17 Sup. Ct. 713, 166 U. S. 637,
41 L. ed. 1145.

It was held by the Supreme Court of Kansas, on July 5, 1883, prior to the adoption of the above mentioned statutes by Oklahoma from Kansas, in *Board of Regents* v. *Linscott*, 30 Kan. 240, 1 Pac. 81, 91, that a sheriff's deed is required in order to vest title to property sold at sheriff's sale on execution.

In *Goldstern* v. *Gavin*, 187 Okla. 338, 102 Pac. (2d) 582, it was held that:

> "When, in the execution case, the court set aside the sale and denied confirmation, title to the property remained in the defendant in that case."

Such is the general law.

In *Ford* v. *Nokomis State Bank*, 135 Wash. 37, 237 Pac. 314, it is held:

> "In this state we have consistently held from *Singly* v. *Warren*, 18 Wash. 434, 51 Pac. 1066, 63 Am. St. Rep. 896, to *Cockran* v. *Cockran*, 114 Wash. 499, 195 Pac. 224, 198 Pac. 270, that a certificate of sale executed by a sheriff does not vest title; * * * a purchaser at a judicial sale * * * cannot be said to hold the title, unless he holds a deed in pursuance of the sale."

To the same effect: *Gray* v. *C. A. Harris & Son*, 200 Wash. 181, 93 Pac. (2d) 385.

And, in *Clark* v. *Strohbeen*, 190 Iowa 989, 181 N. W. 430, 13 A. L. R. 1419:

> "A judgment debtor is not divested of title until after the expiration of the time for redemption and not until title is vested in the purchaser by sheriff's deed."

In *Anthony* v. *Janssen*, 183 Cal. 329, 191 Pac. 538, it is said:

> "With respect to the sheriff's deed, it is sufficient to say, in anticipation of a new trial, that the sheriff was without lawful power at that time to execute a conveyance of the property. * * * The sheriff's power to convey did not accrue until there had been a failure to redeem within the time fixed. * * * The direction in the decree that the deed should be made immediately

after the sale was contrary to the Code, and beyond the power of the court. It was therefore *void.*"

To the same effect:

—*Hall* v. *Yoell,* 45 Cal. 584;

*Moore* v. *Martin,* 38 Cal. 428;

*Bernal* v. *Bleim,* 33 Cal. 668;

*Gross* v. *Fowler,* 21 Cal. 392;

*Conner* v. *Long,* 63 Iowa 295, 19 N. W. 221;

*Gorham* v. *Wing,* 10 Mich. 486.

In *In re Worley,* 50 Fed. Supp. 611 (D. C. Nebr.), it is said, Pages 612-613:

"But this court's inquiry must be directed to the debtor's rights in, and relation to, the farm on the day when she instituted this action. And upon these elements certain decisions of the Supreme Court of Nebraska are instructive. They have to do with the effect of supersedeas, the persistence of the right to redeem, and the status of the title to and the right of possession of foreclosed Nebraska real estate prior to the execution of sheriff's deed.

"In a leading case it was held in 1879 that 'where a proper supersedeas bond is filed and approved' after an order of confirmation of sheriff's sale in foreclosure in which a judgment for deficiency is awarded, 'no execution can issue on the judgment until the bond is set aside, modified, or appellant fails to perfect his appeal.' The suspension for every purpose of the decree of confirmation was asserted. (Citing cases.) Therefore, the filing and approval of the debtor's supersedeas bond in the foreclosure action in the state *court effectively intercepted the execution of a sheriff's deed* to the purchasing secured creditor until the lapse of the statutory period for the lodging of the appeal in the Supreme Court of the state."

See, also:

—*Philadelphia Mtg. & Tr. Co.* v. *Gustus*, 55 Nebr. 435;

*Westerfield* v. *South Omaha Loan & Bldg. Co.*, 80 Nebr. 806, 115 N. W. 305;

*McCourt* v. *Singers-Bigger*, 159 Fed. 102;

*Draper* v. *Davis*, 102 U. S. (12 Otto) 370, 26 L. ed. 121.

And, as further illustrating the contention that it is the law of Oklahoma that a valid sheriff's deed cannot issue pending appeal from an order confirming sale, is the applicable language in *Brauns* v. *Donahoe*, 127 Okla. 33, 259 Pac. 541, 542:

> "It will be observed that this appeal is not from the personal judgment rendered against the defendant below, plaintiff in error here, but is only from the order and judgment of the court confirming sheriff's sale of land; that the supersedeas bond is given to stay the judgment confirming the sale and is conditioned to pay any damages and costs assessed against appellant by virtue of her appeal. The plaintiff, defendant in error, would be entitled to recover on the bond only such damages as he may have suffered *by reason of delay in obtaining sheriff's deed* and stay of judgment confirming sale, including costs of appeal, * * *."

And in *Johnston* v. *Johnston*, 104 Okla. 131, 230 Pac. 700, plaintiff was in possession prior to and at the time judgment was rendered against her in favor of the defendant, and was still in possession at the time her supersedeas bond was executed and approved for the appeal from the judgment. After the appeal was perfected, including the supersedeas bond, defendant obtained an order from the district court

rescinding its order placing plaintiff in possession, declaring the stay bond insufficient, and ordering a writ of possession is favor of defendant. The Court says:

> "The plaintiff contends that the order of the district court, April 8, 1918, was a *void* order and not competent, and we think this contention must be sustained. Section 794, C. S. 1921; *In re Epley*, 10 Okla. 631, 64 Pac. 18; *Egbert* v. *Ry. Co.*, 50 Okla. 623, 151 Pac. 228; *Short* v. *Chaney*, 66 Okla. 258, 168 Pac. 425.
>
> "Defendant says this order was not subject to objection on collateral attack, but this Court thinks that, since it was a void order and made without jurisdiction, it was subject to attack in any proceeding. *Lee* v. *Tonsor et al.*, 62 Okla. 14, 161 Pac. 804; *Roth et al.* v. *Union Nat'l Bank of Bartlesville, et al.*, 58 Okla. 604, 160 Pac. 505; *Choi* v. *Turk*, 55 Okla. 499, 154 Pac. 1000.
>
> "The defendant was allowed to introduce it, but it is not available as a defense, because there is no authority for it, and it is against both the letter and the spirit of the provisions for appeals.
>
> "* * * The judgment of the court as affirmed in Case No. 10125, *Virginia Johnson* v. *E. B. Johnston et al.*, 82 Okla. 259, 200 Pac. 204, held that the defendant, E. B. Johnston, was the owner and entitled to the possession of the premises, but in the appeal by virtue of the supersedeas bond the plaintiff, Virginia Johnson, had the right to the possession until the appeal was passed on and mandate filed in the trial court."

And in *Frensley* v. *Frensley*, 173 Okla. 321, 49 Pac. (2d) 731, it is said:

> "Upon an appeal which stays proceedings, the subject-matter involved is removed from the jurisdiction of the lower court until the appeal has been determined."

The Supreme Court of Oklahoma did eventually hand down its decision that the order confirming sale here involved was correct and should be affirmed; but, until that time that it was "passed on by the Supreme Court and mandate filed" petitioners, under the order of court staying further execution and granting supersedeas, were entitled to retain the *legal title* to their home, and the sheriff was without power or authority to execute and deliver the deed, and the deed was therefore void and conveyed no title whatsoever. Being invalid when issued, it is not made valid by any subsequent affirmance of the order of confirmation.

No other deed has ever been issued. It was under that void deed that the officers acted in executing the writ of assistance. Petitioners therefore, even until now, still own the legal title to said property, and have been at all times entitled to remain in possession thereof until such time, if ever, as a valid sheriff's deed is executed and delivered.

Thus petitioners have been deprived of their property without due process of law.

---

**Point II**

The Circuit Court of Appeals in its opinion says that this was "considered and passed upon by the Supreme Court of Oklahoma in its decision, and specifically considered and adjudicated by our court in its former decision."

True, it was passed on by that Court in *Sabin* v. *Home Owners' Loan Corporation*, 147 Fed. (2d) 653, under an er-

roneous assumption of facts to which attention was called in Petition for Rehearing in that case filed in that Court, (copy of which is on file here in No. 269 Oct. Term 1945) without any citation of law to support it.

It has *never* been passed on by the Supreme Court of Oklahoma.

It has never been before the Supreme Court of Oklahoma.

The Supreme Court of Oklahoma has never had an opportunity to pass on it.

Evidently this Court received this impression from the statement in the brief filed herein by the appellees, on Page 4 thereof:

> "They also must admit that it was presented to the Oklahoma Supreme Court, and decided against them in *Sabin* v. *Home Owners' Loan Corporation*, 105 Pac. (2) 245, *supra*, as that court expressly stated in its opinion, 105 Pac. (2d) 245, 1. c. 247:
>
> " 'Since the defendants furnished no supersedeas bond, execution of the judgment was not stayed by virtue of their notice of appeal'."

There were two appeals in that case, one from the original judgment of foreclosure, and another from the order confirming sale. In the above quotation that court had reference to the first appeal.

Of course, the sheriff's deed had not been executed and delivered prior to the judgment of foreclosure. Therefore its validity could not have been involved in that appeal.

Likewise, the sheriff's deed had not been executed and delivered prior to the order confirming sale. It was done the same day, but *afterwards*. It could not have been involved in that appeal. The *order confirming sale* was necessary before a deed could be issued—but, that order was also appealed from (R. 199), and the order itself granted a supersedeas for a period of twenty days. This is conceded in the opinion of the Court in *Sabin* v. *H.O.L.C.*, 147 Fed. (2d) 653.

It is this that we have urged both in the latter case and in this case. But, aided perhaps by such misstatements as is the above quoted, made by the appellees, as well as by our own inability to clearly point out the facts, the Court was led into an incorrect decision on a question of law when a correct statement of the facts must have resulted in a different disposition of the case, i. e.:

1. The Circuit Court of Appeals s a i d, in *Sabin* v. *H.O.L.C.*, 147 Fed. (2d) 653, *supra*, "We understand that no appeal from the order was ever perfected." Therefore, "The contention that the deed is presently void because at the time of its execution and delivery an order was in force and effect staying execution of the judgment is without merit."

2. In the present case, the Circuit Court says this question was "specifically considered and adjudicated" by the Supreme Court of Oklahoma.

The controlling question is: Whether a sheriff's deed is void when issued while execution was stayed?

It will not do to say that the deed is based on the original foreclosure judgment, and since the foreclosure judgment has been affirmed the deed is now good even though it was bad when issued.

Nor will it do to say that it is based on the order confirming sale, and since that order has been affirmed the deed is now good even though it was bad when issued.

But we say it was void when issued, and it is therefore still void.

Its validity has never been directly attacked until attacked in this case, except for the collateral attack made on it in *Sabin* v. *H.O.L.C.*, Case No. 269 (Oct. Term 1945) in this Court.

The decision based on the prior decision in *Sabin* v. *H.O.L.C.*, 147 Fed. (2) 653), is in direct conflict with *Johnston* v. *Johnson*, 104 Okla. 131, 230 Pac. 700, and no case has been cited to the contrary.

Under the provisions of Section 546, Oklahoma Statutes 1931, then in effect and cited in brief herein, the stay "pending the giving of an undertaking" is as much a *supersedeas*—a setting aside—of the power of the sheriff to act and commanding him to desist from enforcement of the execution by issuing a sheriff's deed, as is the stay which becomes operative by reason of an undertaking given later, and is as much a *supersedeas* as the stay of execution which is "continued in effect" after the actual filing of the appeal. Whether or

not a bond is ever given, and whether or not an appeal is ever perfected, do not take away any of the force of that *supersedeas* so long as it is in effect. This is because courts know that you cannot appeal a case in a day, and they say to the sheriff that he shall likewise not do anything the same day.

---

## II.

### The Writ of Assistance Was Void Because Issued By a Court Without Jurisdiction

In *Egbert* v. *St. Louis & S. F. R. Co.,* 50 Okla.. 623, 151 Pac. 228, the Court held:

> "A 'mandate' is the official mode of communicating the judgment of the appellate court to the lower court.
>
> "If, before a mandate of the Supreme Court has regularly reached the trial court and been spread upon its record, the trial court makes an order allowing the petition to be amended, and the amendment is made accordingly, the order of the trial court and the amendment are null and void, and the petition stands as if no amendment had been made thereto, although the cause in the Supreme Court has been decided, and written opinion filed, prior to the time of making such order and amendment."

To the same effect:

—*Dooley* v.*Foreman,* 94 Okla. 166, 221 Pac. 47;

*Board of Com'rs* v. *Baxter,* 113 Okla. 280, 241 Pac. 752;

*American Inv. Co.* v. *Wadlington,* 122 Okla. 56, 250 Pac. 802.

And it is further held in the *Egbert case, supra,* that:

"It is a general proposition of law that no two courts have jurisdiction of the same cause of action at the same time."

On June 13, 1941, a purported mandate from the Supreme Court of Oklahoma (R. 33) issued in the name of Wayne W. Bayless, Chief Justice, whereas Earl Welch was Chief Justice beginning January 13, 1941, to January 11, 1943, and which mandate bore date of "this 12th day of *June*———" without giving any year, was filed in the District Court of Tulsa County, Oklahoma. On July 21, 1941, the alias writ of assistance upon which petitioners were dispossessed was issued by the Clerk of the District Court of Tulsa County.

On July 24, 1941, prior to any execution on the writ of assistance, petitioners filed in the Supreme Court of the State of Oklahoma, their petition to Recall Mandate and Grant a Rehearing. This was filed with leave of that Court endorsed thereon (R. 34): "Leave granted to file this 24th day of July, 1941. Fleacher Riley, Acting Chief Justice."

Notice of the filing of this was served on A. Garland Marrs, Sheriff of Tulsa County, (R. 35) notifying him of the filing of said petition to recall mandate and for rehearing in the Supreme Court with leave of that Court and that the purported writ of assistance held by him was thereby vitiated.

This writ was issued upon the written application of the H. O. L. C., signed by its attorney, by the same O. K. Wetzel who was present in person when leave was granted by the Supreme Court of Oklahoma to file the petition mentioned. Certainly, therefore, the H. O. L. C. is charged with know-

ledge that they had no right to thereafter proceed to enforce such writ, if such be the law as we shall endeavor now to show.

Can two courts have jurisdiction of the same cause at the same time? In *Egbert* v. *St. Louis & S. F. R. Co., supra,* it is held they cannot. And such is the general rule of law:

—*Ott* v. *Boring,* 131 Wis. 472, 110 N. W. 825, 111 N. W. 833, 11 Ann. Cas. 857;
*Thomas* v. *Thomas,* 27 Okla. 801, 109 Pac. 825 113 Pac. 1058;
*Western Wheel-Scraper Co.* v. *Drinnen* (D. C. Ill.), 79 Fed. 820;
*Blake* v. *Miller,* 118 Ill. 500, 8 N. E. 828;
*Ladd et al* v. *Couzins,* 35 Mo. 513;
*Baggs* v. *Smith,* 53 Cal. 88;
*Shay* v. *Chicago Clock Co.,* 111 Cal. 549, 44 Pac. 237;
*Baker* v. *Borello,* 131 Cal. 615, 63 Pac. 914;
*In re Bullard's Estate,* 3 Cal. Unrep. 688, 31 Pac. 1119;
*Keyser* v. *Farr,* 105 U. S. 265, 26 L. ed. 1025.

The Supreme Court of Oklahoma has held that it has the *power,* even after term, to recall a mandate and grant a rehearing:

—*Brann* v. *Harris,* 173 Okla. 167, 47 Pac. (2d) 876;
*Simmons* v. *Harris,* 108 Okla. 189, 235 Pac. 508;
*Henderson* v. *Pebworth,* 107 Okla. 238, 232 Pac. 74;
*Thompson* v. *Nickle,* 113 Okla. 44, 239 Pac. 649;
*McKee* v. *Thornton,* 81 Okla. 261, 198 Pac. 303;
*St. Paul Fire & Marine Ins. Co.* v. *Peck,* 40 Okla. 396, 139 Pac. 117.

And while it says in several cases that this ordinarlly will

not be done in the absence of fraud, accident, or inadvertance, it did, in at least one case, recall a mandate, grant a rehearing, and render an opinion directly contrary to its original opinion because the Court itself had based its first opinion upon a misapprehension of the law. This was in *Ehrig* v. *Adams*, 67 Okla. 157, 169 Pac. 645, wherein the Court says:

> "Our attention has not been called to any limitation in the Constitution or statutes of this State upon the power of this Court to recall its mandate.
>
> "In the case of *Thomsen et al* v. *Cayser et al.*, 243 U. S. 66, 37 Sup. Ct. 353, 61 L. ed. 597, Ann. Cas. 1917D, 322, in an opinion filed March 6, 1917, the Supreme Court of the United States in overruling a motion to dismiss, based upon the action of the Circuit Court of Appeals in recalling its mandate after judgment had been entered in the lower court and the term had expired, said:
>
> > " 'A writ of error from the federal Supreme Court to review a judgment of reversal with instructions to dismiss the complaint which a Circuit Court of Appeals had entered on rehearing after it had recalled its mandate, previously issued, ordering a new trial, and had set aside the judgment of the court below, need not be dismissed, either because the trial court had theretofore entered judgment on the original mandate, and had adjourned for the term without any application made to recall such judgment, or any writ of error to review such judgment.'
>
> "To the same effect in the case of *Franklin Bank Note Co.* v. *Mackey*, 158 N. Y. 683, 51 N. E. 178, where a motion was made to vacate an order recalling the mandate after the same had been filed and judgment entered thereon in the lower court. In that case the Court of Appeals said:
>
> > " 'It is often erroneously assumed that after the filing of the remittitur in the court below, and order

entered thereon, this court is deprived of all jurisdiction in the cause. In *Sweet* v. *Mowry*, 138 N. Y. 650, 34 N. E. 388, a motion for reargument was granted and a return of the remittitur requested. These acts of the court were held to be a resumption of jurisdiction. * * * It is competent for this court to determine whether it will resume jurisdiction for any purpose, and, having decided to do so, it then requests the court below to return the remittitur. ' "

The Supreme Court of Oklahoma did not ever order the mandate recalled, but they did, as stated, grant leave to petitioners to file on July 24, 1941, a petition in that Court to recall the mandate and to grant a rehearing; and did grant to petitioners leave to file a supplement to said petition for rehearing on September 5, 1941, and the Supreme Court did consider these petitions. and did not pass on the question of wheather they would be granted until September 5, 1941.

In the meantime, after that petition was filed on July 24th, 1941, but before it was passed on, the writ of assistance was executed in the lower court, on July 26th, 1941.

On September 5, 1941, the petition was denied by the Supreme Court. But what if it had been allowed, and the mandate then been ordered recalled? We have shown that the Court had power to do that. The lower Court would then have had to back up, recall its writ of assistance, put petitioners back into possession of their property, and put the matter back in *statu quo* as it was on July 24, 1941; else any subsequent action of the Supreme Court could not be effective. This is one of the reasons no two courts can have jurisdiction of the same cause at the same time.

As to the effect of the Supreme Court of Oklahoma granting permission to petitioners to file the petition mentioned, we find it held by this Court, in *Chicago G. W. R. Co.* v. *Basham*, 249 U. S. 164, 63 L. ed. 534, 39 Sup. Ct. 213, that:

> " • • • whatever its form of finality, if a judgment be in fact *subject to reconsideration* and review by the state court of last resort through the medium of a petition for rehearing, and such petition is presented to and *entertained and considered* by that court, we must take it that, by the practice prevailing in the state, the litigation is not *brought to a conclusion* until this petition is disposed of, and until then the judgment previously rendered cannot be regarded as a final judgment within the meaning of the Act of Congress. We said recently in an analogous case: 'If it were not so, a judgment of state court, susceptible of being reviewed by this court, would, notwithstanding that duty, be open at the same time to the power of a state court to review and reverse.'" *Andrews* v. *Virginian R. Co.*, decided January 7, 1919 (248 U. S. 272, ante 236, 39 Sup. Ct. Rep. 101.)"

This case was followed by the Circuit Court of Appeals for the Ninth Circuit, in *Warren* v. *Terr. of Hawaii*, 119 Fed. (2d) 936, wherein it is said:

> "Appellee contends the appeal was taken too late and that we have no jurisdiction to consider it. The appeal here was not taken within the three months from the entry of the Hawaiian Supreme Court's judgment. There was a petition before that court filed within the time under a court rule giving an unconditional right to file it within 20 days after the filing of the court's opinion. There was also a court rule requiring the issue of the mandate forthwith on the decision of a criminal case. The mandate was issued before the petition was filed. The court had the power to recall it, on its own motion or that of the losing party. *It was not recalled.* The court

in dismissing the petition stated: 'Although without jurisdiction to pass upon the merits of the motion for rehearing, we have carefully examined it and entertain no doubt that were it properly before us for consideration we would be compelled to deny the petition for lack of merit.' * * * Since the court had *power* to recall the mandate, we regard its admitted consideration of the merits an *entertainment* within the rules of *Chicago, Great Western Ry. Co.* v. *Basham,* 249 U.S. 164 (and other cases cited), and hence have given the merits the above consideration."

This last case presents almost the same situation as this case: The Supreme Court of Oklahoma had the power to recall its mandate; it did not recall it; but it did entertain a petition for rehearing. We submit that this amounted to such a reassumption of jurisdiction of the case as to deprive the lower court and its officers to act further while it was thus being considered and entertained by the appellate court.

The Circuit Court of Appeals in this case, while recognizing the power of the Supreme Court of Oklahoma to recall its mandate here involved, refused to follow the decision of this Court in the *Chicago, G. W. R. Co.* case, *supra,* and its decision is in direct conflict with the decision of the Ninth Circuit in the *Warren* case, *supra,* and although its attention was called to both these cases in the briefs, no mention is made of them in its opinion, the Court being content with merely saying that "The granting of leave to file the petition did not effectuate a re-assumption of jurisdiction of the cause" (R. 405), without citing any authority for this conclusion.

Attention is called to the fact that petitioners here filed a petition for ceritorari in this Court to be directed to the Supreme Court of Oklahoma following the denial of the aforesaid petition to recall mandate and grant a rehearing, in Case No. 786, Octover Term, 1941. This they had a right to do, as is stated in *Brann* v. *Harris, supra,* and, as is further stated in that case:

> "The trial court had no right to proceed as if the case were closed while it was still pending in this Court and in the Supreme Court of the United States.
>
> "If the trial court in thereafter proceeding was in the position of passing upon the right of this Court to recall the mandate, that matter could not be properly considered or passed upon by the trial court. *Stanley, County Treasurer* v. *School District No. 4 of Marshall County,* 142 Okla 240, 286 Pac. 340."

We submit that the writ of assistance became vitiated by the act of the Supreme Court in re-assuming jurisdiction of the case, and that the H.O.L.C. could not lawfully permit the sheriff to proceed thereunder until after the Supreme Court of Oklahoma had passed upon the petition to recall mandate, and, after that, not until this Court had passed upon the petition for writ of certiorari on February 2, 1942. (*Sabin* v. *H.O.L.C.*, No. 786, Mem. 315 U.S. 800, 62 Sup. Ct. 625, 86 L. ed. 1201.)

Furthermore, following the filing of the order of this Court denying certiorari in the Supreme Court of Oklahoma, no further action has ever been taken by that Court to again transfer jurisdiction of the matter to the State district court.

We submit, therefore, that jurisdiction of the case still rests at this time in the Supreme Court of Oklahoma.

---

## III.

### The Trial Court Denied Due Process of Law

The trial court denied due process of law by rendering summary judgment without hearing the evidence upon the allegations of fraud, etc., and further denied due process of law by holding that the allegations by petitioners here of an "extension agreement" entered into and carried out was not a defense to the foreclosure action, thereby abridging the rights of the petitioners under the provisions of Title 12, Section 1463(d), U.S.C.A.

Rule 56(c) provides that summary judgment shall be rendered only "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as matter of law."

> "Under this rule, a summary judgment should be awarded only when the truth is quite clear."
>
> —*American Ins. Co.* v. *Gentile Bros. Co.* (C.C.A. Fla., 1940), 109 Fed.(2d) 732, certiorari denied, 60 Sup. Ct. 1075, 310 U.S. 633, 84 L. ed. 1403.

And, in *Clair v. Sears Roebuck & Co.* (D.C., Mo.), 34 Fed. Supp. 559:

> "A movant is not entitled to summary judgment unless the facts conceded show right to a judgment with such clarity as to leave no room for controversy and show

affirmatively that plaintiff would not be entitled to recover under any circumstances."

Appellants contend that, not only should summary judgment not have been rendered against them, because there are presented genuine issues as to material facts, but as a matter of fact and law summary judgment would have been justified in their favor and against the defendants.

The answer of these appellants (R. 63), defendants in the foreclosure case, alleged that on September 10, 1935, they:

> "* * * entered into a further agreement with said plaintiff, that said defendant would begin on October 10, 1936, to pay the plaintiff two installments per month until installments in arrears were caught up; and that these defendants further offered that as an evidence of their good faith, said defendants would pay an extra $100.00 on that date, totaling $215.18; and that said defendants would continue to pay two installments of $57.59 monthly installments, totaling $115.18 per month, until their account was in good standing. It was so agreed between said plaintiff and these defendants.
>
> "These defendants further state that they did undertake and did comply with said agreement and paid thereon to the plaintiffs the sums as agreed. Defendants further state that plaintiff by accepting these payments, pursuant to the provisions of the Home Owners' Loan Act of 1933, the plaintiff had granted to these defendants an *extension of time* for the payments of installments. But the plaintiff disregarding said agreement with said defendants breached the same and immediately instituted this action of foreclosure; therefore depriving these plaintiffs from carrying out said agreement. That by reason of said agreement and said breach of same by the plaintiff, this action is prematurely brought and should be dismissed."

The petition in this case further alleges that this agreement was reduced to writing on November 30, 1936; and this is nowhere denied by the appellees herein.

Section 4(d) of the H.O.L.C. Act [Title 12, Sec. 1463(d), U.S.C.A.] provides, among other things, that:

> "The Corporation may at any time grant an extension of time to any home owner for the payment of any installment of principal or interest owed by him to the Corporation or may at any time during the existence of the mortgage grant an extension and revision of its terms to provide for the amortization by means of monthly payments sufficient to retire the interest and principal within a period not to exceed twenty-five years from the date of its execution if in the judgment of the Corporation the circumstances of the home owner and the condition of the security justify such extension or revision."

This provision does not provide that there must be any new consideration. It is alleged that the extension agreement" with these appellants was entered into under the authority of this portion of the law. And the acceptance by the H.O.L.C. of the payments made in pursuance to the alleged agreement is sufficient to be binding upon them if any consideration be deemed necessary.

This record shows that the payments agreed upon were made:

Exhibit D (R. 165) is a receipt, dated October 10, 1936, for the sum of $215.18 (being two payments of $57.59 plus an extra $100.00 in accordance with the alleged extension agreement), "to be submitted for acceptance or rejection by the Regional Manager supervising the District in which the property is located.

"If accepted the same will be applied as a payment on the numbered account as of the date of such acceptance."

Exhibit E (R. 166) is a certificate by the money order cashier of the United States Post Office at Tulsa, showing additional amounts paid to the H.O.L.C. totaling $230.36, or four additional payments of $57.59 each.

As further evidence that there was in fact an "extension agreement" according to the terms as alleged by appellants, on January 12, 1937, the H.O.L.C. wrote a letter to appellants, Exhibit F (R. 167), stating, in part:

> "Recently foreclosure action was suspended on your loan *based upon definite arrangements made by you.* Our records indicate that you agreed to pay $115.18, November 30, 1936, and our records further show that you only paid $52.59 of this amount. You have also failed to pay $115.18 which you agreed to on December 30, 1936. * * * We are, however, delaying this action for a period of five (5) days, and we suggest that you forward this payment to our office without delay.
>
> "In the future you should strictly comply with your agreement which comprises the only basis upon which legal action is being withheld."

On January 15, 1937, appellants replied to this letter (See Record, Case No. 3063, Page 327), calling attention to the fact that the full two amounts of $115.18 for November 30 and December 31 had been paid, having been sent to the Dallas office.

To this the H.O.L.C. replied on January 20 (R. 168), stating that, although their letter of January 12 told appel-

lants they were delaying action *for five days,* they did, "on January 13" (the very next day) reinstate foreclosure action and that "we cannot give the same our consideration at this time * * * for the reason you have defaulted in the schedule of payments heretofore arranged."

Exhibit H (R. 169) is a copy of a telegram from the Regional Manager of the H.O.L.C. at Dallas addressed to the Assistant General Manager of the H.O.L.C. at Washington, in which he reports, as of March 5, 1937, that the "payments enumerated have been received and credited," and that "*suspension is in order.*" This was received by appellants in a letter dated March 6, 1937, from Senator Elmer Thomas (See Record, Case No. 3063, Page 329), in which he further advised that the State Manager at Oklahoma City had advised "that temporary suspension of foreclosure has been granted to enable borrower to carry out previous agreement made."

Appellants attempted to present these facts, showing the "extension agreement" actually made, and that it had been actually carried out, to the District Court of Tulsa County in the foreclosure case. The District Court of Tulsa County *sustained a demurrer to this plea.* This is shown by the opinion of the Supreme Court of Oklahoma in its opinion in the case on appeal, 187 Okla. 504, 105 Pac.(2d) 245. Yet the Supreme Court went ahead and attempted to decide a question not thus presented to it, saying that there was not a sufficient consideration to support an extension of time for payment.

Appellants have never, however much they have tried, been allowed to present their proof as to this "extension agreement" and the carrying out of it on their part, to *any* court.

Why?

Appellants say that it was primarily because of the disqualification of the trial judge in the foreclosure action. The allegation of his disqualification is nowhere refuted in this record, yet it is abundantly alleged and shown.

The petition alleges (R. 7) that the said trial judge, Prentiss E. Rowe, was a *debtor in default* to the H.O.L.C., and that because thereof he was disqualified and was overreached by said H.O.L.C., by reason of which he sustained a demurrer to appellants' plea of the aforesaid "extension agreement" and did not permit them to prove it as *a defense to the foreclosure action.*

This trial judge himself now says (R. 196) that it was not "called to my attention at the time of the trial of Cause No. 63751-4 * * * that it was claimed an 'extension agreement' had been entered into previously" and "that I would not have permitted the judgment to be entered in this case had these facts and conditions of said alleged "extension agreement' and alleged payments made, in accordance with said alleged agreement, been properly presented to me * * *." Yet it was alleged in the answer, and he sustained a demurrer to that as a defense and did not allow any proof to be made.

And appellants allege in their petition in this case that as a result of this situation, that judge was overreached by the H.O.L.C. They were not permitted to offer proof of this allegation, because a summary judgment was rendered against them. If they could have made this proof, then the judgment rendered by him was and is void.

The Supreme Court of Oklahoma, in *Sabin* v. *H.O.L.C.*, 187 Okla. 504, 105 Pac.(2d) 245 (this case), with reference to this alleged "extension agreement," held that:

> "An agreement to pay, or the payment of a part of a note or interest thereon after the sum thus paid has become due, is not a sufficient consideration to support an extension of time for the payment of the note since such payment is merely a part performance of a duty already existing;"

and therefore held that the allegations of the answer as to the extension agreement entered into under the provisions of Title 12, Section 1463(d), U.S.C.A., *supra*, "did not set out facts sufficient to constitute a defense."

The same Court held, however, in *McConnell et ux.* v. *H.O.L.C.*, 190 Okla. 190, 121 Pac.(2d) 1001, that:

> "The statutory grant of authority to the Home Owners' Loan Corporation to grant extensions is to be exercised in discretion of Corporation and is dependent on circumstances of the mortgagor and condition of the security, and courts cannot interfere with that discretion;"

and saying that:

> "All such powers are vested solely and exclusively in the Home Owners' Loan Corporation. * * * The Home owners' Loan Act is clear and unambiguous.

"We are convinced that the Federal government had certain liberal and beneficent purpose in mind in the creation of H.O.L.C. and it is apparent from the provisions of the Act granting a three-year moratorium at the very inception of each loan that the Congress intended that some liberality in the extension of time for payments of the respective loans be granted."

Article II, Section 6, of the Constitution of Oklahoma, provides that:

"* * * right and justice shall be administered without sale, denial, delay or prejudice;"

and it is held thereunder that a judge trying a case must be unbiased, impartial, and disinterested in the result of the litigation in order that every litigant may have a fair and impartial trial.

—*Son* v. *Linebaugh*, 101 Okla. 291, 225 Pac. 686;
*State* v. *Freeman*, 102 Okla. 291, 229 Pac. 296;
*London* v. *Ogden*, 130 Okla. 189, 265 Pac. 139;
*State* v. *Walden*, 142 Okla. 115, 285 Pac. 951;
*Coker* v. *Crump*, 142 Okla. 150, 286 Pac. 321;
*McCullough* v. *Davis*, 11 Okla. Cr. 431, 147 Pac. 779.

In *State* v. *Fullerton*, 76 Okla. 35, 183 Pac. 979, it is said:

"Under Constitution, Article 2, Section 6, courts should scrupulously maintain the right of every litigant to impartial and disinterested tribunals for determination of his rights, and the presiding judges should be unbiased, impartial, and disintered, and all doubt or suspicion to the contrary must be jealously guarded against, and if possible, eliminated."

Title 22, Section 571, O. S. 1941 (R. L. 1910, Sec. 5812) provides:

"No judge of any court of record shall sit in any cause or proceeding in which he may be interested, or in the

result of which he may be interested, or when he is related to any party to said cause within the fourth degree of consanguinity or affinity, or in which he has been of counsel for either side, or in which is called in question the validity of any judgment or proceeding in which he was of counsel, or interested, or the validity of any instrument or paper prepared or signed by him as counsel or attorney, without the consent of the parties to said action entered of record: Provided, that the disqualifications herein imposed shall not exclude the disqualifications at common law."

The case of *State* v. *Martin*, 125 Okla. 51, 256 Pac. 681, deals with the question of disqualification of judges, and quotes from many other cases, and says:

"It is apparent from the two sections above quoted that the judge of any court of record who is disqualified under the common law would be, and is, disqualified in this state, even though the disqualification be based on some cause other than those causes detailed in the statute. * * * When it is determined that a judge of a court of record is prejudiced in a cause, he is incompetent to sit in said cause, and the *exercise of jurisdiction therein by him in adjudging the issues is beyond his power.*"

And, quoting from the following cases, further says:

"It is the right of every citizen to be tried by judges as free, impartial, and independent as the lot of humanity will admit." *Crocker* v. *Justices of Supreme Court*, 208 Mass. 162, 94 N.E. 369, 21 Ann. Cas. 1061.

"The celebrated jurist, Judge Cooley (Cooley's Constitutional Limitations, Pages 592, 593), says:

" 'No one ought to be a judge in his own cause; and so inflexible and so manifestly just is this rule that Lord Coke has laid it down that "even an Act of Parliament made against natural equity, as to make a man a judge

in his own case, is void in itself; for '*Jura naturae sunt immutabilia,*' and they are '*leges legum*'." This maxim applies in all cases where judicial functions are to be exercised, and excludes all who are interested, however remotely, from taking any part in their exercise. It is not left to the discretion of a judge, or to his sense of decency, to decide whether he shall act or not; all his powers are subject to his absolute limitations'." *State* v. *Robinson,* 35 N.D. 410, 160 N.W. 512.

"The question of the interest of a judge in litigation depends upon the circumstances of each case.

"According to the stern morality of the common law, a judge is required to be legally indifferent between the parties. Any, the slightest pecuniary interest in the result, disqualifies." *Gill* v. *State,* 61 Ala. 169.

"Any interest, the probable and natural tendency of which is to create a bias in the mind of the judge for or against a party to the suit, is sufficient to disqualify. The judge is human, and human nature at best is weak, and as far as it is possible a perfect equipoise should always be preserved in the administration of justice by the courts. Pecuniary interest in the result of the suit is not the only disqualifying interest." *Ex parte Cornwell,* 144 Ala. 497, 39 So. 354.

"In *Medlin* v. *Taylor,* 101 Ala. 239, 13 So. 310, the probate judge, whose qualifications to sit in the cause were under review, was held not to have any disqualifying interest in the result of the case within the provisions of the Constitution or statute. He had, however, *a personal interest in the similarity of the contest then being heard, and that of his own* pending in the circuit court."

It is alleged in the petition herein, and particularly referred to in the response to the motion for summary judgment (R. 140) that Judge Rowe:

"* * * was indebted to the said defendant, the indebtedness being secured by a mortgage on his own home, the

same being in default, and he was not in position to render a judgment against the defendant Corporation without endangering or prejudicing his own personal interests, and his relation as a debtor in default of said defendant Corporation being a fact, the court was imposed upon by said defendant Corporation to the extent that plaintiffs herein were prevented from having their interests and the merits of their defense * * * fairly presented and considered by the court."

It is said in *State* v. *Childers*, 188 Okla. 14, 105 Pac.(2d) 762, citing *State* v. *Pitchford*, 43 Okla. 105, 141 Pac. 433, that the statute:

"* * * should receive a broad and liberal construction, so as to effectuate the purpose of the Legislature and the spirit of Section 6, Article 2 of the Constitution, which requires that 'right and justice shall be administered without sale, denial, delay, or prejudice.' It was said in that case that not only must the judges presiding over the courts of this state be honest, unbiased, impartial and disinterested in fact, but that it is of the utmost importance that all doubt or suspicion to the contrary be jealously guarded against, and, if possible, entirely eliminated, if we are to maintain and give full force and effect to the high ideals and salutary safeguards written in the organic law of the State. It was further said that every litigant is entitled to nothing less than the cold neutrality of an impartial judge, who must possess the disinterestedness of a total stranger to the interests of the parties involved in the litigation, *whether that interest is revealed by the record or by evidence outside the record.*"

One of the issues of fact in this case is whether or not the trial judge was a "debtor" or a "debtor in default" of the defendant at the time he rendered judgment in its favor; also, whether or not he was in fact imposed upon by reason

thereof. If these facts could be established by evidence the summary judgment should not have been rendered, because in that event it would be proved that the foreclosure judgment was void, being rendered by a "disqualified" judge, which goes to the jurisdiction, and constituted a denial of due process of law.

In *Dodd* v. *State*, 5 Okla. Cr. 513, 115 Pac. 632, it is said that:

> "• • • a district judge when disqualified to sit in the trial of a cause could make one order only, and that order was the order certifying his disqualification. This question has been passed upon by the Supreme Court of Oklahoma Territory, the Supreme Court of this State, and by this Court. *Cullins et al.* v. *Overton, Sheriff, et al.*, 7 Okla. 470, 54 Pac. 702; *Lewis* v. *Russell, Judge*, 4 Okla. Cr. 129, 111 Pac. 818; *Coward* v. *State*, 4 Okla. Cr. 122, 111 Pac. 672; *Buchanan* v. *State*, 2 Okla. Cr. 126, 101 Pac. 295."

And, in *Ingram* v. *State* (Okla. Cr.), 3 Pac.(2d) 743:

> "Disqualification of district judge deprives him of jurisdiction to make any order affecting rights of the accused."

From Black on Judgments, Volume 1, Section 174:

> "Accordingly it is held, under statutes forbidding a judge to act in a cause in which he is interested, that if he should assume to decide a case where his personal interest might come in conflict with his judicial indifference, the judgment so rendered would be entirely null *and void*."

From 33 Corpus Juris 1023:

"If the disqualification cannot be waived, or it is considered as founded in public policy, then the act of a disqualified judge is *absolutely void.*" Citing *Hollowap* v. *Hall*, 79 Okla. 163, 192 Pac. 219, wherein it is stated:

"'The rule deducible from the authorities is that, where the *disqualification* of a judge is considered a matter of public policy, a waiver will not be allowed, and the judge is not authorized to sit in the case, even with the *consent* of the parties, and the judgment *is void*'."

In the latter case it was held that certain disqualifications, where known to the party for more than three days prior to the trial, and not availed of by proper procedure, would be considered waived on appeal. However, it is here alleged that appellants had no knowledge of this disqualification until long afterwards.

It is further alleged (R. 17), and not anywhere controverted in this record, that one of the members of the Supreme Court who participated in the decision of this case on appeal was disqualified:

"That said Justice Davison was disqualified to participate therein on May 28, 1940, for the reason that Mr. Justice Davison was employed by said H.O.L.C. from 1933 until he was elevated to the Supreme Court bench in 1937, as an attorney and loan-closer. * * * As soon as this plaintiff, Bertha Florence Sabin, was apprised of this fact, she took the information to Mr. Chief Justice Bayless, who suggested to her to ask Justice Davison to certify his disqualification, which said plaintiff did ask Justice Davison, and Justice Davison told this plaintiff he would so certify his disqualification to the Court, and so plaintiffs have been reliably informed was done."

Nevertheless, although the Oklahoma Supreme Court is composed of nine Justices, of which the concurrence of five is necessary to a decision of any case (Title 20, Sections 2, 13, O. S. A.), the record shows that the decision in *Sabin* v. *H.O.L.C.*, 187 Okla. 504, 105 Pac.(2d) 245, was by only five Justices, of which Justice Davison was one.

In *State* v. *Hocker* (Fla.), 25 L.R.A. 114, it is held:

"The previous relation of attorney and client, as shown in this case, disqualifies a judge in this state."

And in the annotation to that case:

"Under the constitutional and statutory provision, prohibiting a judge from sitting in the trial of a cause when he has been of counsel therein, a judgment rendered by him in such case will generally be held void."

Citing:

—*Wigand* v. *Dejonge*, 8 Abb. N.C. 260;
*Franco Texas Land Co.* v. *Howe*, 3 Tex. Civ. App. 315;
*Fechheimer* v. *Washington*, 77 Ind. 366;
*Chicago & A. R. Co.* v. *Summers*, 113 Ind. 10;
*Bailey* v. *Kimbrough*, 37 Mo. 182;
*Reams* v. *Kearns*, 5 Coldw. 217;
*Newcome* v. *Light*, 58 Tex. 141, 44 Am. Rep. 604.

That a void judgment is subject to attack at any time is so well known that it is hardly necessary to cite authorities. The matter is well discussed and decided in *Ritchie* v. *Sayers*, 100 Fed. 532, and the cases therein cited.

It is earnestly contended that the judgment of foreclosure herein attacked is void, first, because the trial judge was disqualified; second, because one of the appellate judges necessary to the decision, was disqualified.

But, whether or not it is void, still there being a genuine issue of material fact as to such disqualification, as well as to the trial judge being imposed upon and over-ridden by reason of his disqualification, and the entire record and circumstances indicating that such was the fact, which is now supported by his own statement, appellants should have been given an opportunity to make proof of such facts, which, if proven, would have prevented any summary judgment being possible; which judgments constituted a denial of petitioners' rights, privileges and immunities granted by the Fourteenth Amendment to the Constitution, which rights were especially set forth and invoked, and was a denial of due process of law.

The following facts were known to the H.O.L.C., mortgagee, and the presiding judge, Prentiss E. Rowe, mortgagor, but unknown to the Sabins, the defendants in the foreclosure action by the H.O.L.C., until long after the trial of the case in said court aforesaid, as follows:

The trial judge was a mortgagor to the H.O.L.C., the plaintiff in the case against the Sabins, and was in default at the time of the trial of the Sabin case in his court. His own home might be placed in jeopardy if his ruling was not agreeable with the H.O.L.C., plaintiff in said case. You cannot see the picture as it was enacted. Counsel for plaintiff, after several motions and many sharp words towards the defendants and with advice to the court obtained an order prohibiting the defendants from introducing some documentary evidence that they had to introduce, which was competent and

would have prevented a judgment from being rendered against said defendants; then a suggestion for a recess of said case until 1:30 P. M. was obtained and upon the reconvening of court an entirely different atmosphere and conduct of counsel for the H.O.L.C. and the court toward the defendants was present. Counsel for plaintiff, H.O.L.C., withdrew his motion and presented a demurrer to the evidence, which was sustained, and then a motion for a directed verdict was made and sustained and judgment was rendered against the defendants without them having any opportunity at all to present any evidence in behalf of their contentions.

The evidence in this cause has never been presented to a court or jury, and they never have had an opportunity to be presented at any time though often they have made efforts so to do, but each time they would be hedged about on some pretext or technically phrased wording, *but never on the merits of the action.*

The merits of this cause have never had an opportunity to be fairly and impartially presented to an unbiased or unprejudiced court. The district court rendered the judgment without hearing the evidence of these appellants and then the Supreme Court, without hearing any evidence, affirmed the district court; and this fact finally reached the Federal District Court for the Northern District of Oklahoma and there without any evidence being submitted announced that he would follow the Supreme Court of Oklahoma thereby depriving these appellants of their rights, their property and

home, without a fair and impartial hearing at any time, apparently by fraud, collusion, oppression and collective acting, probably not pre-arranged but actually appearing in a courtroom where justice is presumed to be provided impartially, fairly and justly between all litigants.

Judge Prentiss E. Rowe's statement found on Page 196 of the record, with reference to the introduction of the evidence or the failure to introduce evidence is true, which indicates to a very strong degree that in some manner he was led to believe that the representations of counsel for the H.O.L.C., to-wit, "that the defendants, Sabins, had no defense to the foreclosure action," were true and so therefore rendered judgment against the appellants in this cause, and which representations and acts were false and fraudulent but were collectively by court and counsel carried to conclusion by fraud, collusion, and withholding facts that should have been disclosed to the appellants in this action, so that they might have had an opportunity to challenge the jurisdiction of the court or to waive it. Evidence which was competent and which if they had been permitted to have introduced would have been conclusive and there would not have been a judgment for the plaintiff, H.O.L.C., in that action and we would not have this action in this Court at this time, if ever.

We have not been able to discover or observe any affirmative pleas of *res adjudicata* in this action as disclosed by the record, wherever that term is used in the record insofar as we have observed, not affirmative but only passive to submissive hence not rising to the dignity of a plea.

This in an equitable action and plaintiffs pray for an order and decree holding void the purported judgment sale, and the confirmation thereof, and for a cancellation of the purported sheriff's deed to the defendant Corporation, H.O. L.C., and the confirmation thereof, to the end that complete justice may be done between the parties hereto and herein and for such other and further relief in both law and equity as to the Court may seem meet and proper.

The allegations in appellants' petition brings this case within the requirements of equitable jurisdiction.

—*Davis* v. *Tiliston,* 47 U.S. 6 How. 114;
*Shelton* v. *Tiffin,* 47 U.S. 6 How. 168.

The appellants attack the validity of the judgment, sale confirmation, the issuing of a deed and the confirmation thereof as being illegal, as set forth in Paragraph 24 on Pages 21 and 22 of the record in Cause No. 3158, also as set forth in Paragraph 10 on Page 7 of said record to the effect that the Sabins *were paid ahead* to February 4, 1937, but that on January 13, 1937, the said Corporation, H.O.L.C., *denied the receipt of payments* paid by the Sabins to H.O.L.C. and instituted the process of foreclosure action *in violation of the extension agreement* which constituted a fraud upon the Sabins and they were forced to submit to trial thereof before a judge who was doing business with the said Corporation at that time and was in default which acts and demands of said Corporation caused the judge to set said case for trial and tried same without the defendants, Sabins, being per-

mitted to introduce their evidence, which constituted the taking of the defendants' property without due process of law and in fraud of appellants' rights, and an abridgment of their rights under a Federal law.

The appellants further say they have no adequate remedy at law and unless relief in equity be granted as prayed for these appellants will suffer irreparable damages and the loss of their home, wherein they anticipated years of happiness instead of years of litigation.

While the judge may not have been directly and immediately interested in the result of this case in his court and yet the idea or suggestion of self-preservation or the preservation of his own home would be ever present and with danger ahead unless avoided by a judgment in his court in conformity with the desire of the plaintiff Corporation, H.O.L.C., as expressed by its counsel, during the trial.

Any interest, the probable and natural tendency of which is to create a bias in the mind of the judge for or against a party to the suit, is sufficient to disqualify. The judge is human and human nature at best is weak.

—*Ex parte Cornwell,* 144 Ala. 497, 39 So. 354.

If a "judge should assume to decide a case where his personal interest might come in conflict with his judicial indifference, the judgment so rendered would be entirely null and void."

—Black on Judgments, Volume 1, Section 174.

There should be and is a right for every wrong, where there is a prohibition of a fair hearing upon competent evidence, and there is when rules of justice, fairness and honesty and truthfulness are present in our dealings with each other and in courts of justice throughout the land.

> "4. The proper Circuit Court of the United States may, without controlling, supervising, or annulling the proceedings of the state court, give such relief in a case like this as is consistent with the principles of equity, upon the ground of fraud."

That this Court has the power, authority and the jurisdiction, when it appears that the plaintiff, H.O.L.C., aided by skillful counsel and in violation of the intent and purposes of said Act of Congress and in violation of their obligation obtained a judgment which constituted a fraud upon the Sabins.

> "5. The Court in such case does not act as a court of review, nor inquire into irregularities of another court, but it will scrutinize the conduct of the parties and if it finds that they have been guilty of fraud in obtaining a judgment or decree, it will deprive them of the benefit of it, and of any inequitable advantage which they may have derived under it."

The plaintiffs charge in this action (Page 5 of the record) that the agents and servants of the H.O.L.C., Tulsa office, had reported to the home office of the H.O.L.C., at Washington, D. C., that:

> "The Sabins have neglected and refused to complete and finish their home and it was still 'unfinished' and open to the inclement weather and * * * that it was necessary for the H.O.L.C. to foreclose the Sabin note and

mortgage in order to protect the H.O.L.C.'s lien on said property."

That said agents and servants of the H.O.L.C. knew that said representations were untrue and false and fraudulent and a fraud against the defendants and their rights in the premises, which facts were not known to the defendants until after said foreclosure action had been instituted, which facts were never permitted to be introduced as evidence at any time or in any court, or hearing.

> "6. If a case of fraud be established, equity will set aside all transactions founded upon it by whatever machinery or contrivances they may have been effected, whether such machinery or contrivances consist of a degree of equity and a purchase under it, or a judgment at law, or of other transactions between the actors in the fraud."

The above three paragraphs, Nos. 4, 5, and 6, are from the syllabus of *Arrowsmith* v. *Gleason* (United States Supreme Court), 32 L. ed. 630.

The Court must have construed the law to mean that permissible extension agreements were not binding and of no value to the mortgagor without the payment of an additional consideration therefor.

Hence the Court's finding for the plaintiff in the foreclosure action.

The note and mortgage in the instant case was executed and delivered on February 4, 1935. Here let us quote from

the President's message to Congress, April 13, 1933, where he said in part:

> "Implicit in the legislation which I am suggesting to you, is a declaration of national policy. This policy is that the broad interests of the nation require that special safeguards should be thrown around the home ownership as a guarantee of social and economic stability, and to *protect the home owners from inequitable enforced LIQUIDATION*, in a time of general distress is a proper concern of the Government."

The H.O.L.C. Act of 1933 provided for the making of home owners loans, and also Section 4(d) provided for an extension agreement when necessary and the property value was sufficient but made no provision *for any additional consideration* for the execution of an extension agreement.

In reporting the charter of the H.O.L.C. to the House the committee called special attention of the members to the advantage of home owners, if:

> "* * * provision is made for the Corporation to *extend the payments* in case the necessity of the home owner requires extensions."

It was explained to the committee by one of the authors of the Act:

> "* * * that the H.O.L.C. would extend the time of payment of installments, of both principal and interest, until the H.O.L.C. had invested 95 per cent of the appraised *value of the home*, if not 105 per cent."

That was what the committee was told the charter meant. *Nothing about a consideration for an extension agreement.* How now can the Court of our State inject that issue into a foreclosure case at this time?

On Page 10 of the record being carried over from Page 9, it is shown that by virtue of the "extension agreement" when the suit was reinstated they were not in default, counsel for H.O.L.C. created such a disturbance that it prevented the defendants there (appellants here) from presenting any part of the evidence, and at the demand of counsel for H.O.L.C. the court ordered the plaintiffs here (defendants there) to "sit down," refusing them their right to introduce their evidence, but that the plaintiff H.O.L.C. knew the facts that *the Sabins were not in default under the extension agreement but would not let the facts be known to the court,* thereby committed a fraud on the court which rendered judgment against the Sabins. And on Pages 105, 106 and 107 are a number of allegations of fraud, coercing, overreaching and controlling said trial judge by sail defendant Corporation, which, if true, should have been presented to the trial judge, and it occurs to us that a court of equity with its conscionable mind is the plaintiffs' last hope. May we suggest that this Honorable Court has the power and authority to put the machinery into operation by which both these parties to this action (these plaintiffs, appellants here, and the defendants, appellees here) can be treated fairly and justly. They are each entitled to that although one is a "soulless" corporation and the other a home and a family. Lincoln said, if we remember rightly, that *human rights were above property rights.*

May we submit that the H.O.L.C. Act is an Act of Congress and there is a Congressional enactment for the complete

regulation of the H.O.L.C., and it must be governed by the Federal law and not the State law. See *Missouri, Kansas & Texas Railway Co.* v. *Walston*, 37 Okla. 517:

> "The parties must be presumed to have contracted with reference to the Act of Congress and its effect on the subject-matter, and *not* with reference to the state law, for they could *not* by agreement or otherwise make any other law the applicatory law in the determination of the nature, validity, or interpretation of the contract."

(The extension agreement must have been under the H.O.L.C. Act of Congress, and not the State law.)

The case of *Sabins* v. *H.O.L.C.*, and Lot 16, Block 6, in Sunset Terrace Addition to the City of Tulsa in its journey through the courts reminds us of the wanderings, here, there, in and out, round about, very much like the "Story of the Wobbly Calf" through the streets of Boston, as it went in and out, here and there, around and about, down through the forest on the frontier and was followed by others over its crooked path until it became one of the streets of Boston. Foss calls it the "Golden calf of precedent." (156 Pac. 1121.)

So this case and the parties thereto on the part of the defendants in one of the very first steps in this litigation made an unintentional error in pleading, which was misconstrued and at that point Bertha Florence Sabin, appearing for herself, under the Constitution of Oklahoma, took over for herself the greatest task of her young life time.

Unskilled in the methods and modes of procedure, she started out as the early pioneer when he with ax and saw

started into the wilderness of the frontier; at the very outset she struck deep into the legal forest to carve out and preserve for herself and her husband the home that they had builded and bring simplicity and understanding to the practice and to aid in the administration of justice through the courts of our land.

One with more skill and learning would have hesitated a long time before undertaking a task of like character. Without knowledge of legal lore or the extent and density of its wilderness or its forest but with the skill of a Joan of Arc, a determination of Columbus, the understanding of a Jackson and the stick-to-it-iveness of a Grant, to "fight it out on this line if it takes all summer;" little thinking that it would go on for ten long years and the end is not yet, and never yet have the merits or real issues of her cause been presented to a court of equity fairly and freely or to a jury in a court of law, being prevented by H.O.L.C. counsel from so doing. We feel that because her cause is just and for every wrong there is a right, many wrongs have been perpetrated by the interested parties against these appellants. "Let a little sunshine in," see if the sky will become clear and the "mist will roll away," and they can see the home that cost the sum of more than $17,000 and the most anyone else has invested in it is less than $7,000.

We believe that there are many circumstances present in the history of this litigation that represents the indices of a number of fraudulent acts, such as accepting a number of months' payments under the extension agreement, then with-

out any apparent reason and at a time when they had informed them that they had not paid and would only be given five days in which to make the payment, *when the record shows that the payments had been received* (R. 165), October 10, 1936, H.O.L.C. received $215.18, and by January 14, 1937, it had received $230.00 more, or a total of $445.54 within 90 days (R. 166).

Then on January 12, 1937, where they say that they again refer the matter to the legal department: "We are, however, delaying the matter for five (5) days, and suggest that you forward this payment to our office without delay." This letter was sent to the wrong address and then a letter dated January 20, 1937, informing Mrs. Sabin that they had "reinstated foreclosure action on your loan on January 13, 1937," one day after their promise of five (5) days delay (R. 167-168).

History like the above reminds us of Burns: "Man's inhumanity to man makes countless thousands mourn."

In all seriousness, I have never, in my short life time, come in contact with a case with so many glaring, outrageous, inequitable, unjust, and I think unlaw and fraudulent acts, as this record discloses. Would not let the Sabins introduce at the trial evidence that would have changed the result of the trial.

If courts fail to follow the mandatory statutes or presume that they have been followed, how are we to receive equality before the law? Have there been wrongs without remedy in this record?

Federal courts have equitable jurisdiction to enjoin the enforcement of unconscionable judgments at law which have been procured by fraud.

The foundation of equity jurisdiction is the wrong that will be perpetrated if the court of equity does not act. They have plenary jurisdiction to restrain the enforcement of judgments and decrees to which the defendants had a meritorious defense that they were prevented from interposing either by fraud or accident or mistake unimpaired with their own neglect.

—*Barrow* v. *Hunton*, 99 U.S. 80, 25 L. ed. 407;
*Marine Insurance Co.* v. *Hodson*, 7 Cranch. 333, 3 L. ed. 262.

The petitioners here feel that they have had a meritorious defense to the foreclosure action and were prevented from presenting it to the court as hereinabove set forth.

Unavoidable accident or misfortune preventing the party from making his defense at law, is a sufficient reason for the interference of equity in an otherwise meritorious case.

—Story Equity Jur., 13th Edition, Section 885;
*Phillips* v. *Negley*, 117 U.S. 665, 29 L. ed. 1013;
*Metcalf* v. *Williams*, 104 U.S. 93, 26 L. ed. 665;
*National Surety Co.* v. *St. Bank* (U.S. C.C.A.), 61 L.R.A. 394.

If a case of fraud be established equity will set aside all transactions founded upon it, by whatever machinery they may have been effected and notwithstanding any contrivance

by which it may have been attempted to perfect them. It is immaterial, therefore, whether such machinery and contrivance consists of a decree of equity, and a purchase under it, or a judgment at law of other transactions between the actors in the fraud.

—*Arrowsmith* v. *Gleason*, 32 L. ed. 630.

And where the successful party (H.O.L.C.) by fraud, deception, overriding and overreaching, successfully prevented the Sabins from exhibiting fully their case; and by collusion with the sheriff, successfully prevented material witness from being present at said foreclosure trial (R. 12, 13; R. 9-11) this Court has power to give proper relief; *United States* v. *Throckmorton*, 98 U.S. 61, 25 L. ed. 93; and presents genuine issue of fact which may not be passed upon, upon motion for summary judgment.

---

## CONCLUSION

In conclusion, your petitioners respectfully submit that the final determination by this Court of the questions of law and of equity involved in this case is of the utmost importance to the rights of innumerable persons against whom mortgages are being foreclosed every day, and thereby involves large sums of money, as well as the peace and happiness of homes; that the decision of the District Court and of the Circuit Court of Appeals herein is not only contrary to the law, as announced by this Court in its earlier decisions, contrary to the law announced by other Circuit Courts as well as contrary

to the decisions of the local State courts of Oklahoma, but puts the stamp of approval upon the deprivation of a person of his home without due process of law and without an opportunity to be heard, and, instead of promoting the liberal and beneficent purpose in mind in the creation of the Home Owners' Loan Corporation by the Federal government, will permit the creation of regrettable confusion regarding questions of law and equity in the minds of every person dealing with that organization.

Respectfully submitted,

HERBERT K. HYDE,
406 Perrine Building,
Oklahoma City, Oklahoma,
*Attorney for Petitioners.*

ROY ST. LEWIS,
National Press Building,
Washington, D. C.;

LEE WILLIAMS,
406 Perrine Building,
Oklahoma City, Oklahoma,
*Of Counsel.*

MARCH, 1946.